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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 LESLIE JACK, et al.,

11 Plaintiffs,

12 v.

13 ASBESTOS CORPORATION LTD,  
14 et al.,

15 Defendants.

CASE NO. C17-0537JLR

ORDER

16 **I. INTRODUCTION**

17 Before the court is Plaintiffs Leslie Jack and David Jack's (collectively,  
18 "Plaintiffs") motion to extend (1) the deadline to disclose their expert witness Dr. Ronald  
19 Gordon's opinion and report; and (2) the deadline for expert witness Dr. Carl Brodtkin to  
20 supplement his opinions based on Dr. Gordon's report. (Mot. (Dkt. # 402).) Defendant  
21 Ford Motor Company ("Ford") opposes the motion (Resp. (Dkt. # 405)), and Defendants  
22 Union Pacific Railroad Company ("Union Pacific"), Warren Pumps, LLC ("Warren

1 Pumps”), and Borgwarner Morse TEC LLC (“Morse TEC”) join in Ford’s opposition  
2 (Union Pacific Joinder (Dkt. # 419); Warren Pumps Joinder (Dkt. # 422); Morse TEC  
3 Joinder (Dkt. # 423)). The court has reviewed the motion, the submissions in support of  
4 and in opposition to the motion, the relevant portions of the record, and the applicable  
5 law. Being fully advised, the court GRANTS Plaintiffs’ motion.

## 6 **II. BACKGROUND**

7 On October 18, 2017, various Defendants requested an autopsy of decedent  
8 Patrick Jack to preserve his lungs for later tissue digestion studies. (*See* 10/18/17 Mot.  
9 (Dkt. # 207).) The court granted the request and ordered an autopsy to be performed by  
10 neutral, third-party examiner, Dr. Carl Wigren on October 26, 2017. (10/25/17 Order  
11 (Dkt. # 232) at 1-2.) Dr. Wigren performed the autopsy and preserved Mr. Jack’s lung  
12 and lymph tissue. (Adams Decl. (Dkt. # 403) ¶ 2, Ex. A (“Autopsy Rep.”) at 6.)

13 On March 22, 2018, Defendant Crosby Valve, LLC (“Crosby”) moved to allow  
14 Dr. Victor Roggli to perform tissue digestion and fiber burden analysis studies on the  
15 preserved lung tissue. (3/22/18 Mot. (Dkt. # 270) at 1-4.) The court granted the order  
16 that same day. (3/22/18 Order (Dkt. # 273) at 1-2.) However, due to Dr. Roggli’s  
17 workload, Dr. Roggli could not finish his report by the April 18, 2018, expert disclosure  
18 deadline. (4/16/18 Mot. (Dkt. # 284) at 1-2.) Plaintiffs agreed to an extension of the  
19 deadline, provided that their expert, Dr. Gordon, could also have an extension to perform  
20 the same studies. (Adams Decl. ¶ 4.) Crosby and the Plaintiffs agreed that Dr. Gordon  
21 would have until June 11, 2018, to disclose the results of his tissue digestion study, and

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1 that Dr. Brodtkin would have until June 11, 2018, to supplement his existing opinion  
2 based on Dr. Gordon's results. (*Id.*; *see also id.*, Ex. B ("Emails").)

3 Crosby and Plaintiffs drafted a stipulation reflecting their agreement, but because  
4 Ford would not agree to the extension, the parties did not file the stipulation. (*See* Adams  
5 Decl. ¶ 4; Emails at 6-7; *see generally* Dkt.) Instead, Crosby moved to extend the expert  
6 disclosure deadline on April 18, 2018. (4/16/18 Mot. at 1-2.) Ford filed an opposition to  
7 the motion. (*See* 4/16/18 Resp. (Dkt. # 286).) Ford eventually withdrew its opposition  
8 (*see* Supp. Reply (Dkt. # 347) at 1), and the court granted Crosby's motion to extend the  
9 disclosure date for Dr. Roggli from April 18, 2018, to April 24, 2018 (*see* 4/27/18 Order  
10 (Dkt. # 348)). After completing his tissue digestion study, Dr. Roggli shipped the lung  
11 tissue back to Dr. Wigren on April 12, 2018. (*See* Emails at 3.)

12 Dr. Wigren did not ship the lung tissue to Dr. Gordon until May 14, 2018, and Dr.  
13 Gordon received the tissue two days later on May 16, 2018. (Adams Decl. ¶ 5, Ex. C  
14 ("FedEx Tracker").) Upon receiving the lung tissue, Dr. Gordon completed his testing  
15 and report. (*Id.* ¶ 6.) Plaintiffs shared both Dr. Gordon's report and Dr. Brodtkin's  
16 supplemental report based on Dr. Gordon's testing to all Defendants on June 5, 2018.  
17 (*Id.* ¶¶ 6-7; *id.* ¶ 6, Ex. D at 1-4.) Plaintiffs now move for an extension of the expert  
18 disclosure deadline for both Dr. Gordon's opinion and Dr. Brodtkin's supplemental  
19 opinion. (*See* Mot.)

### 20 III. ANALYSIS

21 Federal Rule of Civil Procedure 16(b)(4) provides that a schedule may be  
22 modified only for good cause and with the court's consent. Fed. R. Civ. P. 16(b)(4).

1 Rule 16(b)'s good cause standard "primarily considers the diligence of the party seeking  
2 the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.  
3 1992). The court may modify a pretrial schedule if "it cannot reasonably be met despite  
4 the diligence of the party seeking the extension." *Id.* (internal quotation marks omitted)  
5 (quoting Fed. R. Civ. P. 16 Advisory Committee's Notes (1983 amendment)).

6 Here, Plaintiffs have established good cause and that they could not have met the  
7 April 18, 2018, disclosure deadline even through due diligence. Indeed, Dr. Wigren did  
8 not ship the lung specimen for testing until May 14, 2018, and Dr. Gordon did not receive  
9 the lung tissue until May 16, 2018. (*See* Mot. at 4; FedEx Tracker at 1.) Dr. Brodtkin, in  
10 turn, could not have supplemented his report until after Dr. Gordon completed his testing  
11 and findings. None of these delays were due to carelessness on the part of Plaintiffs. *See*  
12 *Pritchard v. Dow Agro Servs.*, 255 F.R.D. 164, 177-79 (W.D. Pa. 2009) (allowing  
13 amendment when moving party was not responsible for the delay). Because the court  
14 finds that Plaintiffs could not have reasonably met the disclosure deadline despite their  
15 diligence, the court finds good cause to modify the scheduling order.<sup>1</sup>

16 Ford does not dispute that Plaintiffs exercised diligence here. (*See* Resp.) Instead,  
17 Ford focuses on alleged "procedural deficiencies" in Plaintiffs' motion. (*See id.* at 2-4.)  
18 The court has already discussed one of the supposed procedural deficiencies—namely  
19 that Plaintiffs did not adhere to the April 18, 2018, expert disclosure deadline. Ford's

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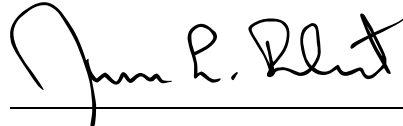
21 <sup>1</sup> Moreover, Ford has not demonstrated any resulting prejudice. The record evinces that  
22 Defendants now have both Dr. Gordon's report and Dr. Brodtkin's supplemental report;  
furthermore, Plaintiffs promptly scheduled Dr. Gordon's deposition so that Ford, and other  
defendants, could question him regarding his findings. (*See* Adams Decl. ¶¶ 6-7.)

1 remaining argument fares no better. Ford chastises Plaintiffs for not filing a motion  
2 asking the court for leave to perform tissue digestion studies on the lung tissue preserved  
3 at the autopsy. (*See id.* at 2-4.) But the court has already granted permission for studies  
4 to be performed on the tissue at issue (*see* 3/22/18 Order), and the court sees no reason  
5 why Crosby and other Defendants should be allowed to perform such an analysis while  
6 Plaintiffs are barred from doing the same. Thus, the court declines to exclude the expert  
7 reports on this basis.<sup>2</sup>

#### 8 IV. CONCLUSION

9 For the foregoing reasons, the court GRANTS Plaintiffs' motion to extend the  
10 deadline to disclose Dr. Gordon's opinion and Dr. Brodtkin's supplemental opinion to  
11 June 11, 2018 (Dkt. # 402).

12 Dated this 22nd day of June, 2018.

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15 JAMES L. ROBART  
16 United States District Judge  
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21 <sup>2</sup> Ford additionally argues that Dr. Gordon and Dr. Brodtkin's reports are untimely  
22 rebuttal reports. (Resp. at 4.) However, Plaintiffs have clarified that neither report is being  
offered as rebuttal. (Reply (Dkt. # 427) at 4-5.) Accordingly, the court disregards this argument.